

BEFORE THE INDIANA CIVIL RIGHTS COMMISSION
311 West Washington Street
Indianapolis, Indiana 46204

STATE OF INDIANA)
) SS
COUNTY OF MARION)

MARCUS L. BROWN,
Complainant,

DOCKET NO. 05131

vs.

TIPPECANOE SCHOOL CORPORATION,
Respondent.

ADOPTION OF HEARING OFFICER'S RECOMMENDED FINDINGS OF FACT
CONCLUSIONS OF LAW, AND ORDER

The Indiana Civil Rights Commission, having reviewed and considered the Recommended Findings of Fact, Conclusions of Law, and Order, submitted in this action by Kenneth W. Maher, Hearing Officer, and the Objections filed thereto by Complainant, adopts the submitted recommendation as the final Findings of Fact, Conclusions of Law and Order of the Indiana Civil Rights Commission, with the following corrections.

1. Paragraph 50 of the Recommended Findings of Fact should read:

50. Therefore, Complainants lost wages for January, 1974 were \$404.86.

2. Paragraph 16 of the Conclusions of Law should read:

16. Complainants losses of \$404.86 less \$158.00 unemployment compensation equal \$246.86, which sum should be restored by Respondent.

3. Paragraph 2 of the Order should read:

2. Tippecanoe School Corporation shall pay to Complainant, Mar Brown, two hundred forty-six dollars and eighty six cents (\$246.86), within (30) days of receipt of notice that a majority of the Commission has approved this Order.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the attached Recommended Findings of Fact, Conclusions of Law and Order, submitted in this action, as corrected above, be and hereby is adopted as the Final Findings of Fact, Conclusions of Law, and Order of the Indiana Civil Rights Commission.

Dated: March 21, 1980.

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MARCUS L. BROWN,
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vs.

TIPPECANOE SCHOOL CORPORATION,
Respondent.

RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW, AND ORDER

The undersigned Hearing Officer was appointed to hear the above-captioned case and all parties were notified of said appointment at the pre-hearing conference held prior to the commencement of this hearing held on July 26, 1979 and August 1, 1979.

Complainant Marcus L. Brown, (hereinafter Complainant) was present at that hearing and was represented by counsel, Ms. Patricia E. Pinckney and Ms. Harinder Kaur. Respondent Tippecanoe School Corporation (hereinafter Respondent) was represented by counsel, Ms. Susan B. Tabler.

Having considered the official record, including the Stipulations of Fact filed by Complainant and Respondent, the evidence admitted at the Hearing, the arguments of counsel, briefs and proposed Findings of Fact, Conclusions of Law and Orders submitted by each, and being duly advised in the premises, the Hearing Officer hereby recommends the entry of the following Findings of Fact, Conclusions of Law, and order:

FINDINGS OF FACT

1. Complainant, Marcus L. Brown, is a black male U.S. Citizen.

2. Complainant was employed as a custodian at Wainwright High School in Lafayette, Indiana, from September 1973 until January 2, 1974.
3. Wainwright High School in 1973 was a school within the Tippecanoe School Corporation and personnel at Wainwright High School were employees of the Tippecanoe School Corporation.
4. Complainant was discharged from employment with Wainwright High School on January 2, 1974.
5. Complainant filed the complaint in this cause on January 7, 1974, claiming his discharge was discrimination because of his race.
6. Complainant was interviewed for the position of night custodian at Wainwright High School by David Thayer, Principal at Wainwright High School in September of 1973. During that interview, Principal Thayer told Complainant that Complainant was the first black person that Thayer had employed.

In the course of the interview, Complainant informed Thayer that Complainant was a student at Purdue University and there would be occasions when due to testing he would be tardy.

Complainant was informed that his hours of work would be from 3:00-11:00 pm and that Complainant should call in advance to inform Thayer of any anticipated tardiness.
7. Complainant was informed that if he had to be late he could work past 11:00 pm to make up the time.
8. In 1973 it was the policy of the Tippecanoe School Corporation that custodians could not be paid for more than 40 hours per week.
9. As a result of this policy, custodians at Wainwright High School were allowed compensatory time off if it became necessary for them to work more than 8 hours in a day or to work on a Saturday.
10. Although Records were kept indicating when employees were docked for working less than 40 hours per week, no records were kept as to the exact times worked by employees.

11. Although Complainant was late from time to time, he had notified Mr. Thayer in advance and his attendance was not a problem prior to the Christmas vacation.
12. Complainant was never docked for working less than 40 hours per week.
13. Complainant's job performance was acceptable according to Mr. Thayer.
14. A heavy snowfall closed school on December 19, 20, and 21, 1973 and Mr. Thayer notified Complainant that it would be necessary for him to come into work because the road which he would have had to travel was closed.
15. The evidence admitted at hearing contained considerable conflict over what work schedule Complainant was to work on December 24, 26, 27, 28 and 31, 1973.
16. Complainant testified as to a discussion with Mr. Thayer and no one else present:

He asked me did I want to come in at eight (8) to four (4), or did I still want to work from three (3) to eleven (11). I suggested to him I wanted to work from three (3) to eleven (11) because that way I could rest for my school and I didn't have to get up too early. And he said that would be fine with him because for security in the evening time in the building. Tr. 19, See also Tr. 73.

17. It is hereby found that Complainant's hours were not changed from 3:00 to 11:00 because of Complainant's testimony and the following evidence adduced from Respondent's witnesses.

- a. Mr. Thayer's testimony that a meeting was held with all three custodians in which it was decided that they all would work day hours during the Christmas vacation was contradicted not only Complainant's testimony, but also by the testimony of the other two custodians, Byron Wolfe (who testified that he was not present when Mr. Thayer allegedly told Complainant to work day hours but that he had assumed that Mr. Thayer had told Complainant

that when he was hired, Tr. 140) and James Smith (who, though testifying as to a meeting also testified that he could not say for certain whether Complainant was at the meeting and the never heard Mr. Thayer personally instruct Complainant what hours to work during the Christmas holiday, Tr. 313, 314).

b. Although Complainant should have been told that he would be working day hours during Christmas at the time he was hired according to Mr. Wolfe (Tr. 130, 140, 141) and Mr. Smith (Tr. 314), Mr. Thayer testified that he did not tell Complainant at the time he was hired that he would work day hours during Christmas (Tr. 285, 286).

c. Byron Wolfe, the head custodian testified that he did not instruct Complainant to work day hours because Mr. Thayer was the one who told everybody what hours they were to work (Tr. 140).

d. Byron Wolfe testified that Complainant still came in at 3:00 to 11:00 during the Christmas week (Tr. 133). Such conduct from a person who had not had prior attendance problems would have been inconsistent with the claim that he was instructed to report at 6:00 or 8:00

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18. On Friday, December 28, 1973, Complainant left work early to leave for Indianapolis to catch a flight to New York City at 8:35 pm.

19. Although Mr. Thayer does not recall being notified that Complainant would be working a short day on December 28, 1973 or going to New York City, Complainant's testimony that he had explained to Mr. Thayer that he had overtime hours and Mr. Thayer had said it was okay is credible in view of the practices explained in Findings 8, 9, and 10 *Supra* and Mr. Thayer's testimony that he had no proof that Complainant worked less than 40 hours that week (tr. 292, 293).

20. Complainant had booked passage back to Indianapolis for 7:30 am, Monday morning, December 31, 1973.

21. On Sunday evening, December 30, 1973, Complainant listened to a radio broadcast that announced that the airports in New York City were closed due to a snowstorm.

22. Complainant called airport personnel to confirm that the airport would be closed and was informed that the airport was closed indefinitely and that his flight back to Indiana was cancelled.

23. Principal Thayer, on December 31, 1973 had come to the school at 8:00 am, on December 31, 1973 but no one answered the phone.

24. Complainant called the Principal's office at 7:30 or 8:30 am, on December 31, 1973 but no one answered the phone.

25. After attempting the call to the Principal's office; Complainant contacted his brother, Robert Brown. His brother was requested to explain to Principal Thayer that Complainant would not be in that afternoon as Complainant was snowed-in in New York City.

26. Robert Brown relayed Complainant's message to Principal Thayer by 1:30 pm, on December 31, 1973. Robert Brown's conversation with Principal Thayer was of two minutes duration. Principal Thayer did not tell Robert Brown that that Complainant was terminated nor did he tell Robert Brown to instruct Complainant not to come in to work upon Complainant's return.

27. Upon Complainant's return, Principal Thayer informed Complainant that Complainant was terminated for absenteeism.

Complainant and Thayer had a heated discussion. In the conversation Complainant voiced his belief that he had been discriminated against.

Principal Thayer did not indicate at that time that Complainant had been tardy during the Christmas vacation.

28. Principal Thayer did not record in detail incidents of Complainant's tardiness during the Christmas week vacation, nor did Principal Thayer

prepare a record for submission to the Tippecanoe School Corporation administrative officers documenting incidents of tardiness.

29. With the exception of Principal Thayer's recollection that Complainant arrived to work one day at either 1:00 pm or 2:00 pm., Principal Thayer could not recall the times of Complainant's tardiness, nor could he provide dates of such tardiness.

30. Complainant's pay records indicate that in December of 1973, Complainants gross hourly pay was increased from \$414.00 to \$425.00 per month.

31. Principal Thayer did not recommend to administrative personnel that Complainant be docked for tardiness.

32. Principal Thayer had no knowledge whether Complainant had failed to work forty-hours during Christmas vacation.

33. It was not until Complainants absence on December 31, 1973 that Principal Thayer decided to terminate Complainant.

34. Six custodial employees who have been identified as Caucasians by stipulation were docked for absenteeism.

35. The Tippecanoe School Corporations policy in 1973 required custodial personnel to inform their schools principals prior to the beginning of their custodial shifts of impending absences so that substitute custodial personnel could be contacted.

36. Complainant's brother contacted Principal Thayer prior to Complainants 3:00 pm to 11:00 pm custodial shift to report Complainants absence. Principal Thayer did not attempt to secure substitute custodial help but elected to provide custodial assistance himself.

37. There was no evidence presented to show that any Caucasian employee has ever been terminated for missing one day when the absence was reported prior to the scheduled working time, but there was evidence that Caucasian employees were absent and not terminated when the absence was reported in advance.

38. Complainants custodial duties were undertaken by Gorden Ruan, a Caucasian.

39. Complainant, after his termination, applied for unemployment benefits, and Mr. Thayer responded in a request for information:

Mark (sic) Brown did not appear for work on December 31, 1973. I received a call at about 1:30 pm on December 31, from Mark (sic) Brown' brother informing me that Mark was not going to be at work that day. Marc was in New York City and was waiting on a plane departure. Mark (sic) normally worked at 3:00 pm to 11:00 pm but during the holiday we agreed to work during the day. Mark (sic) did work on the other days scheduled but his arrival time for work was very erratic during the Christmas holiday, I never knew when to expect him and I don't know how long he stayed after the other men left to go home after their regular day. When he failed to show up for work on December 31, 1973 I decided then to terminate his employment I explained to Marc as I have stated here my reasoning. I conclude with this statement. I have one full time custodian for the 3:00 pm to 11:00 pm shift, we have so may activities going on that I needed someone who I definitely knew would be here to take care of the building.
(Respondents Exhibit 5)

40. Respondent's witnesses maintained the same position as to the reason for Complainants discharge at the hearing.

41. Had he not been discharged, Complainants hours from January 2, 1974 would have been from 3:00 pm to 11:00 pm.

42. Mr. Thayer testified that Complainant had not had any attendance problem with 3:00 pm to 11:00 pm hours.

43. Complainant sought work through the Indiana Employment Security Division after his discharge.

44. In February of 1974, Complainant obtained employment as a gymnastics instructor with Y.M.C.A.
45. Complainant could not recall when, in February 1974, he obtained such employment or what his earnings were.
46. Complainants hours on the Y.M.C.A. gymnastics instructor position were from 3:00 pm to 7:00 pm.
47. Complainant voluntarily resigned this position after only two days without good cause and due to personal reasons, and interference with his schooling.
48. Had Complainant not been discharged, his earnings from Respondent for January 1974 would have been \$425.00.
49. One days pay would have been deducted from Complainants January earnings for his absence on December 31, 1973 which occurred after the December payroll had been made up. This deduction can be calculated as 1/21 of \$425.00 or \$20.24.
50. Therefore Complainants lost wages for January 1974 were \$400.86.
51. Since there is a conflict in Complainant's Testimony with regard to whether he started receiving unemployment compensation before or after he worked for the U.M.C.A., (see Tr, 31, Q. and A's 98 and 99), the Hearing Officer hereby takes administrative notice of IC 22-4-14-4 and finds that with due diligence, Complainant could have applied for unemployment compensation during the week of his discharge; fulfilled the waiting period required by IC 22-4-14-4 during the following week, and received benefits for the weeks ending January 19 and 26, 1974.
52. Since Complainant's unemployment compensation benefits were at the rate of \$79.00 per week, Complainant received, or could have received with due diligence, \$158.00 in unemployment compensation for the month of January 1974.
53. Complainant was a full time student at Purdue University during both semesters of the 1973-1974 school year.
54. Any Conclusion of Law which should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties.
2. The complaint was timely filed.
3. Tippecanoe School Corporation is a “person” as that term is defined in IC 22-9-1-3(a).
4. Tippecanoe School Corporation is an “employer” as that term is defined in IC 22-9-1-3(h).
5. Complainant presented a prima facie case that Tippecanoe School Corporation Committed a “discriminatory practice” as that term is defined in IC 22-9-1-3(1) in that Complainant proved the following (Compare *McDonnell-Douglas Corp v. Green*, 411 U.S. 792 5FEP 965 (1973)):
 - a. He was a member of a protected class, namely the Negro race.
 - b. He was adequately performing his job.
 - c. He was discharged.
 - d. His position was not eliminated, but was subsequently filled by a white male.
6. Respondent produced evidence of a legitimate non-discriminatory reason for discharging when it proved that its stated reason for discharging Complainant was his absence on December 31, 1973 without prior notification and his erratic work schedule during the prior week.
7. Respondents stated reason for discharge is concluded to be pretextual because:

a. It has been found that Complainant did notify Respondent of his absence prior to his scheduled starting time.

b., Respondent failed to prove that Complainants work schedule was erratic during the prior week other than one day (December 28, 1973) which was found to be excused.

c. The evidence was uncontradicted that Complainants work schedule would have been 3:00 pm to 11:00 pm starting the next working day after his discharge and Complainant's attendance had never been a problem on that schedule

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8. Evidence of disparate treatment due to race existed when Complainant was discharged for missing one day although he notified the Respondent of such absence prior to his 3:00 pm starting time and Caucasian employees were not discharged where they had notified Respondent in advance of absences.

9. Respondent is concluded to have committed a discriminatory practice as that term is defined in IC 22-9-1-3(1) in that:

a. Complainant presented a prima facie case,

b. Respondents articulated reason is concluded to be pretextual, and

c. Evidence of disparate treatment due to race exists.

10. When the Indiana Civil Rights Commission finds a person has committed an unlawful discriminatory practice, it may order the person to cease and desist from the unlawful discriminatory practice and to restore the Complainants lost wages, salary or commissions pursuant to IC 22-9-1-6(k) (1).

11. Complainant attempted to mitigate his losses when he sought work through the Indiana Employment Security Division.

12. Complainant's status as full-time student did not render him unavailable for work and does not preclude him from recovering lost wages when he had been a full time student while he was employed prior to his discharge. To rule otherwise would be to deny civil rights in employment to students.

13. Complainants availability for employment, and lost wages resulting from the discharge ceased when he obtained employment with the Y.M.C.A. and subsequently resigned for personal reasons and interference with school although no hours of employment beyond (in fact less than) those with Respondent were required.

14. Since Complainant could not prove what date in February employment with the Y.M.C.A. began he failed to prove any lost wages subsequent to February 1, 1974.

15. Complainant's losses were reduced to the extent he received (or could have received with due diligence) unemployment compensation benefits.

16. Complainant's losses of \$400.86 lost wages less \$158.00 unemployment compensation equal \$242.86, which sum should be restored by Respondent.

17. Any Finding of Fact which should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. Tippecanoe School Corporation shall cease and desist from terminating Blacks for absenteeism in situations where Caucasians are not so terminated.
2. Tippecanoe School Corporation shall pay to Complainant, Marc Brown, two hundred forty-two dollars and eighty six cents (\$242.86), within thirty (30) days of receipt of notice that a majority of the Commission has approved this order.

Dated: October 18, 1979